Filed 11/15/10 In re R.S. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re R.S., et al., Persons Coming Under the Juvenile Court Law.	
C.S., Plaintiff and Appellant, v. SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES Defendant and Respondent.	E050490 (Super.Ct.Nos. J200494, J224325) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Wilfred J. Schneider, Jr., Judge. Dismissed in part and affirmed in part.

Michael D. Randall, under appointment by the Court of Appeal, for Plaintiff and Appellant.

Ruth E. Stringer, County Counsel, and Kristina M. Robb, Deputy County Counsel, for Defendant and Respondent.

Plaintiff and appellant C.S. (Mother) appeals from the juvenile court's order summarily denying her Welfare and Institutions Code section 388[1] petition seeking reinstatement of services and visitation with her son, J.S., and daughter, R.S. Mother's sole contention on appeal is that the juvenile court abused its discretion in summarily denying her section 388 petition. We reject this contention and will affirm the trial court's order in regard to R.S. We will dismiss the appeal in regard to J.S., since the trial court no longer had jurisdiction over him at the time Mother filed her section 388 petition.

I

FACTUAL AND PROCEDURAL BACKGROUND

Mother first came to the attention of the San Bernardino County Children and Family Services (CFS) in March 2005 based upon allegations of Mother's chronic substance abuse, mental illness, and neglect. Mother was found in a deplorable home that had no running water, feces overflowing from the toilet, rotting food covering the floors, and numerous methamphetamine pipes. Mother admitted to abusing methamphetamine. She also suffered from a bipolar disorder. J.S., then age two months, was removed from Mother's custody and placed in a confidential foster home.

The juvenile court sustained the petition on behalf of J.S. pursuant to section 300, subdivisions (b) (failure to protect) and (g) (no provision for support). Mother's efforts

---

[1] All future statutory references are to the Welfare and Institutions Code unless otherwise stated.

to reunify with J.S. were unsuccessful. Meanwhile, J.S. was thriving in his foster home and developing a strong bond with his caretakers. Mother's services as to J.S. were terminated on May 11, 2006, and a section 366.26 hearing was set.

Mother subsequently filed a writ petition challenging the termination of her services and setting a section 366.26 hearing. However, the appeal was dismissed after mother's counsel indicated there were no factual issues upon which to base a writ petition.

On October 16, 2006, Mother's parental rights were terminated, and adoption was selected as the permanent plan for J.S. J.S. had been mentally, educationally, and physically developing well. He had been placed with his prospective adoptive parents since April 1, 2005.

On September 14, 2007, Mother filed a section 388 petition, seeking reunification with J.S. "or visitation." Mother claimed that she was clean and sober and in a treatment program for mothers and children. The court summarily denied the petition. J.S.'s adoption was finalized on July 1, 2008, and the dependency was discharged.

After Mother's paternal rights as to J.S. were terminated, Mother gave birth to her second child, R.S., in August 2007. R.S. was detained by CFS in early November 2008, after she was found in a home in the same condition as that from which J.S. had been removed. There was no running water, electricity, or gas; no edible food; and the home was filthy. A section 300 petition was filed on behalf of R.S. based again upon allegations of Mother's chronic substance abuse, mental illness, and neglect.

R.S. was formally detained and placed in a confidential foster home on November 10, 2008. The social worker had initially recommended reunification services for Mother but later changed that recommendation to no services pursuant to section 361.5, subdivision (b)(2). The social worker explained that Mother was unwilling to follow the directions of CFS, and her negative behavior indicated she would not benefit from services. Mother had continued to abuse drugs, display violent and irrational behavior, and act inappropriately during visits, and she failed to take her psychotropic medication to stabilize herself. In addition, she had appeared at some visits with R.S. under the influence of drugs and had been arrested for violating her parole and sentenced to prison. The court suspended visits between Mother and R.S. on January 21, 2009.

The juvenile court sustained the section 300 petition on behalf of R.S. on January 29, 2009.

The contested dispositional hearing was held on March 2, 2009. At that time, Mother's counsel indicated to the court that Mother wanted to have new counsel appointed. The court thereafter held a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). Following the hearing, the court denied Mother's request to relieve her appointed counsel. Mother's counsel then asked for a continuance to allow Mother to gain confidence in his representation again. The court granted the continuance.

The further contested dispositional hearing was held on March 25, 2009. Following admission of evidence, including testimony from Mother and the social

worker, the court denied reunification services to Mother pursuant to section 361.5, subdivision (b)(10), (11), and (13). R.S. was declared a dependent of the court and maintained in her confidential foster home. The court further found that visitation with R.S. was detrimental and ordered the visits terminated. The court thereafter set a section 366.26 hearing and advised Mother of her appellate writ rights.

On March 27, 2009, Mother filed a notice of intent to file a writ petition pursuant to California Rules of Court, rule 8.450. On April 23, 2009, Mother dismissed her petition.

R.S. was appropriate for adoption due to her young age and her prospective adoptive parents' willingness to adopt her. She had been mentally, educationally, and physically developing well in her prospective adoptive home, although she displayed some aggressive behavior and temper tantrums. She had been placed with these prospective adoptive parents since her removal on November 5, 2008, and appeared bonded to them. Her prospective adoptive parents were very committed to providing R.S. with a safe, stable, loving, and nurturing home.

In July 2009, Mother gave birth to a third child, A.S., who was also detained.[2]

On July 15, 2009, Mother filed a section 388 petition, asking the court to change its prior order and grant her reunification services and visitation with R.S. Mother filed a second section 388 petition on August 14, 2009. As changed circumstances, Mother

---

[2] A.S. is not involved in this appeal.

claimed that she had completed inpatient and outpatient drug treatment programs, and stated that she did not need social services to accommodate her in doing so. She further asserted that she had a healthy support system, had continuously maintained her sobriety, and had abided by CFS requirements and the law.

A combined hearing on the section 388 petition and the selection and implementation was held on September 14 and 22, 2009. Following the presentation of evidence, in which several witnesses testified, the court denied Mother's section 388 petition. The court terminated parental rights, finding R.S. to be adoptable.

Mother subsequently filed a notice of appeal as to the termination of her parental rights involving R.S. Mother's sole issue on appeal was that the information provided in the notices by CFS sent to Indian tribes, pursuant to the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) (ICWA) was incomplete, requiring reversal of the order terminating parental rights. After a thorough review of the entire record, we agreed that the notice provisions of ICWA were not adequately complied with and remanded the matter for that limited purpose. (*In re R.S.* (Feb. 19, 2010, E049293) [nonpub. opn.].)

On March 19, 2010, Mother filed a third section 388 petition as to both R.S. and J.S. seeking reunification services and visitation. In the petition, Mother stated that she was "willing to admit to needing help" but believed she was capable of raising the children. She further asserted that she was willing to do what was necessary "to stay stable." In response to the question, "If anyone disagrees with your request, please explain why (*if known*)," Mother stated, "All here said is erelavent with out fact do to me

having my own written document that me Attornay did on want to present." (Quoted verbatim.)

The court summarily denied Mother's section 388 petition. The court's order noted that the request did not state new evidence or change of circumstances and that the request did not promote the children's best interests. This appeal followed.

II

DISCUSSION

Mother contends that the juvenile court abused its discretion in denying her section 388 petition without a hearing. She also appears to argue that her section 388 petition implicitly requested appointment of new counsel and therefore the court erred in failing to conduct a *Marsden* hearing.[3]

A. *Section 388 Petition*

As Mother acknowledges, by the time she filed her section 388 petition in March 2010, her parental rights to J.S. had been terminated, and he had already been adopted. The juvenile court therefore no longer had jurisdiction over J.S. A party may not challenge an order terminating parental rights by means of a section 388 petition "because once parental rights have been terminated, 'the court shall have no power to set

---

[3] CFS requests that we take judicial notice of the court's minute order of the June 18, 2010, hearing, at which upon remand the juvenile court found that ICWA did not apply as to R.S. and reinstated the order terminating parental rights as to her. As we find it not relevant to resolve the issues in the instant case, we deny the request for judicial notice.

aside, change, or modify' the judgment terminating parental rights. [Citation.]" (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1071.) Thus, Mother could not bring a section 388 petition seeking modification as to J.S. Accordingly, we dismiss Mother's appeal as to J.S. (*In re X.V.* (2005) 132 Cal.App.4th 794, 800.)

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new or changed circumstances exist, and (2) the proposed change would promote the best interest of the child. [Citation.] The parent bears the burden to show both a '"legitimate change of circumstances"' and that undoing the prior order would be in the best interest of the child. [Citation.]" (*In re S.J.* (2008) 167 Cal.App.4th 953, 959 [Fourth Dist., Div. Two].) "The petition is addressed to the sound discretion of the juvenile court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion. [Citation.]" (*Id.* at pp. 959-960.)

The petition must be liberally construed in favor of its prima facie sufficiency to trigger a hearing to consider the parent's request. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) If the liberally construed allegations of the petition do not show changed circumstances or new evidence that the child's best interests will be promoted by the proposed change of order, the court need not hold a hearing. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) General or conclusory allegations are not enough to make a prima facie showing under section 388. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) "A 'prima facie' showing refers to those facts which will sustain a favorable

decision if the evidence submitted in support of the allegations by the petitioner is credited." (*Ibid*.) The petition must include "specific allegations describing the evidence constituting the proffered changed circumstances or new evidence." (*Ibid*.) "Successful petitions have included declarations or other attachments which demonstrate the showing the petitioner will make at a hearing of the change in circumstances or new evidence." (*Anthony W.*, at p. 250.) Indeed, "[i]f a petitioner could get by with general, conclusory allegations, there would be no need for an initial determination by the juvenile court about whether an evidentiary hearing was warranted. In such circumstances, the decision to grant a hearing on a section 388 petition would be nothing more than a pointless formality." (*Edward H.*, at p. 593.) If the petition fails to make the required prima facie showing, summary denial of the petition without a hearing does not violate the petitioner's due process rights. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 460-461.)

In the present matter, Mother did not make a prima facie showing that her circumstances had changed or that the modification was in the best interest of R.S. In fact, Mother's March 2010 section 388 petition did not even allege specific allegations describing the changed circumstances; it merely contained general or conclusory allegations. Mother's primary contention was that she had a changed state of mind but provided nothing to show that she had actually changed. In addition, the petition was not supported by any supporting documentation demonstrating a change in circumstances or new evidence since her parental rights were terminated as to J.S. Mother had a history of being repeatedly incapable of combating her substance abuse and mental health issues,

despite having had the benefit of several years of reunification services. Thus, in order to make the required prima facie showing of changed circumstances, Mother had to proffer evidence that she was currently drug free, taking her psychotropic medication, and capable of protecting and adequately caring for R.S. She did not make this showing. In short, Mother proffered no evidence of changed circumstances or new evidence, other than her admission that she required help to remain stable. This was insufficient.

Moreover, Mother failed to make a prima facie showing that providing her with reunification services with the goal of returning R.S. to her care and visitation with R.S. would serve the best interest of the child. The record clearly shows that R.S. was bonded to her prospective adoptive parents and that she had no bond with Mother. R.S. was placed with her prospective adoptive parents since November 5, 2008, when she was about 16 months old, and they were committed to providing R.S. with a safe, loving, stable, and nurturing home. By the time Mother filed her section 388 petition, R.S. had been in a stable, prospective adoptive home for about two years, was doing well, and had bonded with the family. Mother's ability to successfully achieve unsupervised visitation and to then reunify with the child was extremely uncertain by comparison. Mother had not visited R.S. since her visits were suspended in January 2009, and she had failed to combat her substance abuse and mental health issues. Given that Mother's services had been terminated on March 25, 2009, R.S.'s interest in the permanency and stability she had found outside Mother's care was paramount. Mother did not show that returning R.S. to her custody would *benefit* R.S. in any way. "After the termination of

reunification services, . . . 'the focus shifts to the needs of the child for permanency and stability' [citation] . . . ." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Those needs could best be met by letting R.S. be adopted by her prospective adoptive parents.

Under these circumstances, we cannot conclude the juvenile court abused its discretion in denying Mother's section 388 petition without a full evidentiary hearing.

B. *Implicit Marsden Request*

Mother argues that "[i]mplicit in her petition was a request for a *Marsden* hearing." In support, Mother cites to her recent section 388 petition, her previous concern regarding her counsel's representation, and her counsel's statement that he did not file Mother's two previous section 388 petitions.

Parents in dependency cases have a statutory right to competent counsel under section 317.5, subdivision (a). In addition, the principles set forth in *Marsden*, *supra*, 2 Cal.3d 118, have been held applicable to juvenile dependency cases. (*In re Ann S.* (1982) 137 Cal.App.3d 148, 150.)

The requirements of *Marsden* have been explained, in the context of criminal proceedings, by our Supreme Court: "When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become

embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations]." (*People v. Crandell* (1988) 46 Cal.3d 833, 854, abrogated on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

However, "[t]he trial court is not obliged to initiate a *Marsden* inquiry sua sponte. [Citation.] The court's duty to conduct the inquiry arises 'only when the *defendant* [here, Mother] asserts directly or by implication that [her] counsel's performance has been so inadequate as to deny [her] [her] constitutional right to effective counsel.' [Citations.]" (*People v. Lara* (2001) 86 Cal.App.4th 139, 150-151, italics added.)

Here, while the record shows that Mother had previously made a *Marsden* motion, which was denied following a hearing, it does not show that Mother actually made such a request in her section 388 petition. Mother's notation in her section 388 petition that "me having my own written document that my Attornay did on want to present" does not, even by implication, constitute a request for a *Marsden* hearing. This statement does not allude to any dissatisfaction with counsel based on performance or representation. (See *People v. Lara, supra*, 86 Cal.App.4th at p. 151.) Furthermore, it appears that Mother's inchoate expressions of dissatisfaction seem to focus mainly on her unhappiness with the outcome of the proceedings and not particularly on her lawyer's representation. The record unquestionably demonstrates that any lack of progress in the case stemmed from Mother's ongoing difficulties in combating her substance abuse and mental health issues. Therefore, because there was no request for a hearing into counsel's representation in her section 388 petition either directly or implicitly, or anytime after her previous *Marsden*

request for that matter, the juvenile court did not err in failing to initiate such an inquiry on its own motion. (*People v. Montiel* (1993) 5 Cal.4th 877, 905-906.)

Even if we assume, for the sake of argument, that Mother's statements were sufficient to warrant a *Marsden* hearing, we find any error to be harmless. To warrant reversal, *Marsden* error must be prejudicial; it is not reversible per se. (*People v. Chavez* (1980) 26 Cal.3d 334, 347-349.) The record in this case clearly establishes that had Mother been appointed new counsel she still would not have been able to show her section 388 petition would have been granted. There is nothing in the record to indicate Mother had shown changed circumstances or that her request was in R.S.'s best interest. Almost certainly, her section 388 petition would have still been summarily denied.

III

DISPOSITION

The appeal as to J.S. is dismissed. The order denying Mother's section 388 petition is otherwise affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.